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No. 1179

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# In the Supreme Court of the United States

OCTOBER TERM, 1967

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LOUIS LEIGHTON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 33-36) is reported at 386 F.2d 822.

### JURISDICTION

The judgment of the court of appeals was entered on December 15, 1967. A petition for rehearing was denied on January 8, 1968. On January 30, 1968, Mr. Justice Harlan extended the time for filing a peti-

tion for a writ of certiorari to March 6, 1968, and the petition was filed on February 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the court of appeals properly found that, in the circumstances of this case, petitioner was not prejudiced when the trial judge instructed him that he should not discuss his testimony with defense counsel during a luncheon recess.

2. Whether a recording of petitioner's conversation with an Internal Revenue agent was properly admitted into evidence.

3. Whether the evidence established entrapment as a matter of law.

4. Whether the court was required to determine the issue of entrapment at a hearing before trial.

## STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York of paying $200 to Thomas Tiffany, an employee of the Internal Revenue Service, with intent to influence his official acts, in violation of 18 U.S.C. 201(b).[1] He was sentenced to imprisonment for six months and fined $2,000.

1. In November 1965, Thomas Tiffany, a revenue agent assigned to examine petitioner's tax returns,

[1] The jury acquitted Harold Miller who was jointly charged with petitioner.

made an appointment to see him (Tr. 16-17). On December 8, 1965, while Tiffany was examining some records at petitioner's place of business, petitioner's accountant, co-defendant Harold Miller, said he would like to "wrap it up" and asked Tiffany if he owned a home. When Tiffany answered that he did not, Miller replied that he had asked that question because he was employed by a nursery firm. Miller also told the agent that some "fringe benefits" would be put on his job (Tr. 18-23, 26, 172-173). A short time later, petitioner entered the room and left some currency on the desk where Tiffany was working. Later petitioner returned, took the money, counted it and made out what appeared to be a deposit slip (Tr. 28-29). Upon leaving, Tiffany gave Miller a list of additional items that he wanted to see in order to continue with the audit (Tr. 27). When Tiffany returned to his office he communicated with the Inspection Office of the Internal Revenue Service (Tr. 29-30).

On December 21, 1965, after being outfitted with recording devices, Tiffany returned to petitioner's place of business (Tr. 31-32, 55, 57). Petitioner inquired whether he could ask Tiffany something "off the record". When Tiffany replied affirmatively, petitioner said that in the spirit of Christmas he would like to give the agent a suit of clothes or a couple of hundred dollars. Tiffany indicated that this would be all right with him. Petitioner then said that there was nothing materially wrong with the returns filed except perhaps some oversight. Later, after Miller arrived, petitioner said that he hoped the agent was not bugged (Tr. 34-37). Two hours later, as Tiffany

was leaving the premises, petitioner put two hundred dollars in the agent's raincoat pocket (Tr. 38-40).

Testifying in his own defense, petitioner claimed that on December 8, 1965, Tiffany had stated that he wished he could afford clothes as expensive as petitioner's, and had remarked that bank tellers were encouraged to embezzle money by being poorly paid, that he himself was poorly paid, and that the government was taking in money but he was not profiting thereby (Tr. 411-414). Concluding that these remarks were an overture for money, petitioner considered it necessary to offer Tiffany something at his next visit (Tr. 422, 424-425). Petitioner also explained that he had placed the currency on the desk where Tiffany was working in order to prepare a bank deposit (Tr. 416-419).

2. Following the direct testimony of agent Tiffany, the first government trial witness, the court recessed for lunch. At petitioner's request, the court instructed Tiffany not to discuss his testimony with anyone (Tr. 49). Again, at the conclusion of the day, this time at the request of counsel for the co-defendant, the court again instructed Tiffany not to discuss his testimony during the overnight recess (Tr. 153). On the third day of trial, co-defendant Miller testified in his own defense. In a recess taken during his cross-examination, the court instructed Miller not to discuss his testimony with his attorney[2] (Tr. 374-375). Later that

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[2] At that time, the following occurred:

THE COURT: What do you want to say? I am making a ruling. I am asking Mr. Miller during the recess he please not discuss the testimony with the lawyer.

MR. KASANOF: If your Honor please, I want the

morning, petitioner took the stand in his own behalf, concluding his direct examination at the noon recess (Tr. 427-428). The following then ensued (Tr. 429):

> MR. OBERMAIER [The Prosecutor]: May the witness be instructed as before your Honor?
>
> THE COURT: Yes.
>
> MR. ROSENTHAL [Petitioner's Attorney]: Dont' talk to me about the case.
>
> And may I have an exception, your Honor, the same as Mr. Kasanof [Miller's Attorney] had with respect to this instruction?

After the recess, petitioner completed his testimony and offered no other witnesses (Tr. 434 *ff*).

On appeal the court of appeals found that the ruling barring communication between petitioner and his counsel during recess was "quite plainly uncalled for," but that, under the standard of *Chapman* v. *California*, 386 U.S. 18, reversal of the conviction was not warranted.

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record to specifically show that your Honor is directing him not to speak to me during the recess.

THE COURT: Not until he finishes his testimony.

MR. KASANOF: I specifically object on the ground it deprives the defendant of assistance of counsel.

THE COURT: I am not depriving him of assistance of counsel at all.

MR. KASANOF: So the record may be complete, your Honor, I take the position that if the defendant may not at any time during any recess, including when he is on the stand, or in the middle of cross-examination—and that is the fact here—that if he is forbidden to confer with counsel that such a prohibition deprives him of the assistance of counsel.

THE COURT: All right.

## ARGUMENT

1. The record here amply supports the determination of the court of appeals that the ruling barring communication between petitioner and his counsel during the luncheon recess was not reversible error. Since the declaration of the recess between the direct and cross-examination was itself not a matter of right but rested in the sound discretion of the court, it is difficult to see how petitioner was prejudiced by the trial court's ruling.

Here, petitioner had initiated the procedure of directing a witness not to talk to anyone during a recess by seeking such a ruling while Agent Tiffany was testifying. Having succeeded in imposing this restriction on the single government witness to the bribe, petitioner's counsel was under a duty to indicate to the court how a similar restriction imposed during petitioner's testimony would impair his right to the effective assistance of counsel.[3] However, when the prosecutor requested that the "witness be instructed as before", defense counsel immediately responded by instructing his client not to talk to him about the case. As the court of appeals pointed out, the objection to this ruling appeared to be "an attempt to sow reversible error into the record, rather than an effort to indicate to the trial judge that the attorney and client had something to discuss" (Pet. App. 35).

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[3] Had there been any meaningful basis for such a claim, it could have been presented easily at the time the restriction was imposed.

The circumstances here are thus significantly different from *United States* v. *Venuto*, 182 F.2d 519 (C.A. 3), upon which petitioner relies. In that case the court, singling out the defendant from all other witnesses, instructed him not to consult with counsel during an eighteen-hour overnight recess under a threat that he would revoke defendant's bail and commit him to jail incommunicado if he were to consult counsel. Moreover, that case was a complicated income tax case involving numerous records where consultation during the case may well have been necessary for effective assistance of counsel. Here the disputed factual issues were simple and the need to consult with counsel during the recess was not apparent.[4] Thus, the court below properly concluded that, in the circumstances of this case, there was "no actual harm to the right to the effective assistance of counsel" (Pet. App. 36).

2. The admissibility of the recording of the conversation on December 27, 1965, made by a Minifon carried in Tiffany's person, is controlled by *Lopez* v. *United States*, 373 U.S. 427.[5] The fact that prior to the use of the Minifon in *Lopez* there was an unequivocal bribe offer, while here the conduct and statements of petitioner and his accountant merely

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[4] *Bitter* v. *United States*, 389 U.S. 15, is not in point. The order incarcerating the defendant for being tardy constituted a punishment without any hearing and was, therefore, deemed unjustified.

[5] At the trial, the court sustained a defense objection to the introduction of a written transcription of the recording (Tr. 271-272).

suggested a bribe, furnishes no valid ground of distinction. Nor do recent decisions of this Court undermine the holding in *Lopez*. See the government's brief in opposition in *Long* v. *United States*, No. 1001, certiorari denied March 4, 1968.

3. There is no merit to the contention that the evidence established entrapment as a matter of law. The government's evidence showed that at the first visit petitioner placed money on the table where Tiffany was working and that Miller talked of giving the agent some "fringe benefits". This refutes the claim that the crime originated with the government agent. The fact that at the beginning of the second visit the agent did not stop petitioner when he requested an "off the record" conversation can hardly be said to have induced the crime. Nor does the acquittal of Miller compel the conclusion that the jury rejected Tiffany's version of the conversations at the first visit. Aside from the fact that the jury can return inconsistent verdicts, the jury may have found that Miller was not sufficiently involved to warrant his conviction as an aider and abettor.

4. Equally unsound is the contention that petitioner was entitled to a separate hearing before the court on the issue of entrapment. This Court has held that the defense of entrapment is a question for the jury in determining guilt or innocence. *Sorrells* v. *United States*, 287 U.S. 435; *Sherman* v. *United States*, 356 U.S. 369. There is nothing in this case which warrants a re-examination of the rule. Indeed, the disputed factual issue—who initiated the bribe—was particularly appropriate for determination by a jury.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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